UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs- 02-CR-214S

SAHIM ALWAN,

Defendant.

Proceedings held before the

Honorable William M. Skretny, Part IV,

U.S. Courthouse, 68 Court Street,

Buffalo, New York on April 8, 2003.

APPEARANCES:

WILLIAM J. HOCHUL, JR.,
Assistant United States Attorney,
Appearing for the United States.

JAMES P. HARRINGTON, ESQ.,
Appearing for Defendant.

Michelle L. McLaughlin, RPR,
Official Reporter,
U.S.D.C. W.D.N.Y.
(716)332-3560

THE CLERK: Criminal case 02-214S, United States of America versus Alwan.

THE COURT: Okay. This matter is set for the taking of a plea pursuant to a plea agreement.

Is the government ready, Mr. Hochul?

MR. HOCHUL: We are, your Honor. Thank you.

THE COURT: And seated with you at counsel table are both Agents Needham and Britton, is that correct?

MR. HOCHUL: That's correct, your Honor.

THE COURT: Okay. All right. Also is the defense ready in this case, Mr. Harrington?

MR. HARRINGTON: Yes, Judge.

THE COURT: Okay. And, Mr. Alwan, you're ready to go forward?

THE DEFENDANT: Yes, sir.

THE COURT: If you would stand, please. I understand that you're not going to swear to Alla, but you will affirm at this point, is that correct?

(Affirmation administered.)

THE COURT: Mr. Sahim Alwan, I'm going to ask you to keep your voice up and to speak into the microphone. I notice that you are nodding your head a little bit, and sometimes I do the same thing. The problem with that is it cannot be recorded by my court reporter. So you must answer yes or no when the -- when that is your answer rather than nod your head, is that clear?

THE DEFENDANT: Yes.

THE COURT: Okay. That sounds good. I am going to be asking you a series of questions. Keep in mind that you have affirmed. In other words, you have agreed to tell the truth, and that's significant because I have the expectation that you are going to give me truthful answers to my questions. That's the government's expectation also.

Because you have made that agreement, if it is believed, for example, by the government that you are not telling the truth, it can seek to bring other charges against you. For example, under certain circumstances making a false statement under oath can be a separate federal crime, and that carries with it a separate penalty distinct from the penalty that you face in connection with this plea agreement. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And similarly there may be other charges that can be brought. For example, under certain circumstances the crime of perjury may apply. And perjury itself is a separate and distinct crime that carries with it a separate and distinct penalty, do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. And there are references to both of those other crimes in the plea agreement document, but for emphasis purposes it should be brought to your attention before I ask you certain questions, which I'm about to do in short order.

Just so you know, the questions that I will be asking you are essentially the same and identical questions that I ask each individual who appears before me as a defendant in a criminal case. In large measure the reason for that is that the law requires that I gather certain information that will enable me to make certain determinations with respect to what you know as far as your options in proceeding forward. I have to make certain determinations of whether what you are doing is voluntarily or not.

And furthermore, I need to make determinations in terms of your understanding of your constitutional and statutory rights, hence the purpose of asking particular questions in this case. Is that clear to you?

THE DEFENDANT: Yes, sir.

THE COURT: All right. As far as your attorney in this case, it's Mr. James Harrington.

And, Mr. Harrington, you're an assigned attorney, is that right?

MR. HARRINGTON: Yes.

THE COURT: All right. And I'd ask you, Mr. Harrington, to keep your voice up also. I know the microphone is not near you.

And that corresponds, Mr.Alwan, to what your rights are under our constitution and laws of this country. In other words, you have the right to be represented by an attorney of your choice, and that would be someone that you would hire at your own expense. However, if you do not have the funds sufficient to hire the attorney that you want, and provided you qualified after providing a financial affidavit to this Court and continue to so qualify, an assigned attorney will be made available to you. And in this case James Harrington is a skilled and capable and competent defense lawyer who practices regular in this court.

That lawyer right extends until this case is complete in all respects. And there are a lot of portions of the plea agreement that have indefinite durations to it, depending on the completion, for example, of your cooperation in this case. But in any event, whenever you meet until the case is complete with prosecutors, representatives of the government, law enforcement personnel, agents, police officers, sheriff's department personnel as it relates to the facts and circumstances leading to the charges in this case, you have the right to have your attorney present.

And that right extends to that point in time when you are being interviewed by the probation office in its effort to gather information. And as you know or should know, and tell me if you don't, the probation office will put together a report. And it will be on the basis of information you provide, the government provides, the Probation Department's independent investigation. When all of that is complete, a report will be prepared, and you will get to see it with your attorney before I do, but in any event -- and that will be to enable you to make any corrections or attempt to work out any disputed issues.

Once all of that is worked out, it eventually gets to me. If everything is in order, it becomes final. I use that information for purposes of sentencing. And if there are disputes that have not been resolved, then it may necessitate the conducting of a mini trial, in other words, a hearing, where witnesses and evidence can be presented.

The government would have a certain burden perhaps at that, but it would be different from a trial where the government's burden is proof beyond a reasonable doubt. I may just simply listen to the argument of the attorneys, or I may listen to your testimony and you may be subject to cross-examination.

When I get all of that information I will then address the open issues or the disputed issues in the presentence report, tell you what my reasons are for the decision that I will make. I will then make a decision. That will finalize the report, and then I will give you an opportunity to make a statement. Your attorney will have that an opportunity. And the government may have an opportunity if it's not inconsistent with the terms and conditions of the plea agreement.

After I hear everybody out, I will be in a position to impose sentence. Do you understand all of that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, I mentioned to you that your attorney right extends until this case is complete in all respects. And that would mean not only today, but sentencing and any appeal to a higher court that you may choose to take.

You also have the right to proceed on your own without the assistance of a lawyer. Now, if that was your choice and you decided to do that in connection with an appeal to a higher court -- keep in mind in order to be appeal eligible, you must file a Notice of Appeal document. And that is required to be filed within ten days after I complete the sentencing judgment document paperwork which follows the sentencing in this case. If you don't do that timely, you may not be permitted to take an appeal to a higher court.

Also, keep in mind that with respect to any appeal waiver provisions in the plea agreement, those will apply to what remains of your right to appeal to a higher court, and they will be controlling, do you understand all of that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Before I get to proceeding forward in what your other rights are, let me just find out a little bit of information from you this morning. Noting your orange uniform, I take it at some point you were brought to the Erie County holding facility from Niagara County is that right?

THE DEFENDANT: Yes, sir.

THE COURT: And you came here directly and you are in custody at the present time, right?

THE DEFENDANT: Yes, sir.

THE COURT: Did you have any drugs or alcohol before coming to court today?

THE DEFENDANT: No.

THE COURT: How old are you by the way?

THE DEFENDANT: Thirty.

THE COURT: All right. Married, single?

THE DEFENDANT: Married.

THE COURT: All right. Any children?

THE DEFENDANT: Three.

THE COURT: Okay. And where were you born?

THE DEFENDANT: Buffalo, New York.

THE COURT: Okay. And what's the highest grade in school that you have completed?

THE DEFENDANT: Associate's degree.

THE COURT: Where was that?

THE DEFENDANT: ECC.

THE COURT: In what?

THE DEFENDANT: In criminal justice.

THE COURT: Okay. Approximately when was that?

THE DEFENDANT: I graduated in 2000 -- '99.

THE COURT: Okay. And within reason then you read, write, and understand the English language, correct?

THE DEFENDANT: Yes, sir.

THE COURT: Any difficulty understanding me?

THE DEFENDANT: No.

THE COURT: All right. If you do, interrupt, ask me to repeat things, I will do that. If you don't understand the question, ask me to repeat the question. If you're uncertain about the answer, just let me know, and I will give you whatever time you need to discuss matters with Mr. Harrington until you're clear in mind so that you can answer the questions that I'm in the process of asking you, is that clear?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Have you had any difficulty understanding your lawyer?

THE DEFENDANT: No.

THE COURT: Are you satisfied with the legal representation that Mr. Harrington has given to you?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Mr. Harrington, any reservations about your client's understanding of the terms, conditions, or possible consequences that he faces in connection with this proceeding?

MR. HARRINGTON: No, Judge.

THE COURT: Do you have any reservations whatsoever on your client's competency to proceed forward?

MR. HARRINGTON: No, sir.

THE COURT: All right. Do either of you, Mr. Alwan or Mr. Harrington, know of any reason why we should not go forward here today?

THE DEFENDANT: No.

MR. HARRINGTON: No.

THE COURT: Okay. Prosecution?

MR. HOCHUL: No, your Honor. Thank you.

THE COURT: Have you had sufficient time, Mr. Alwan, to devote to, if you will, to digesting your attorney's advice, considering the documents in this case in making what is an important decision in your life with respect to how to proceed in this criminal case? Have you had sufficient time to do that?

THE DEFENDANT: Yes, sir.

THE COURT: Have you consulted with all of those that you have wished to consult with?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Are you comfortable with the documents in this case, in other words, the plea agreement document, and the indictment document, which is a two-count indictment that's been returned by a federal grand jury against you. Do you understand them and are you comfortable with them?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Do you have any questions about either of those two documents that have not been answered to your satisfaction by your attorney or anybody else that you have consulted with?

THE DEFENDANT: No.

THE COURT: Do you want to discuss any

open questions about those two documents with me at this point?

THE DEFENDANT: No.

THE COURT: All right. You mentioned to me that you came here directly from the holding facility in the custody of law enforcement. Do you have any medical conditions that require you to take medication of any kind, prescription or nonprescription?

THE DEFENDANT: No.

THE COURT: Within the last year -- well, two years, have you received any evaluation or treatment for any mental health or substance abuse problem, including drugs and/or alcohol?

THE DEFENDANT: No.

THE COURT: Have you taken any medication today whatsoever, whether it's prescription or not, over-the-counter, anything including aspirin or anything along those lines?

THE DEFENDANT: No.

THE COURT: Anything that you know of that interferes with your ability to clear think and understand the proceedings as they are unfolding with you here in this court today?

THE DEFENDANT: No.

THE COURT: Okay. All right. We talked about certain of your rights up to this point in time. And I mentioned to you in particular two specific documents. We are going to go through those in detail, not verbatim, not word-for-word, but I want to assure myself, and I want to be assured that you are not only comfortable with those documents, but that you have a clear understanding of the contents of both of those documents, is that clear to you?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now assuming everything goes according to script today -- and I did get some last minute corrections or changes to the plea agreement. I take it that's all there is in terms of the document you've given me to review in advance of this day's court proceedings, Mr. Hochul?

MR. HOCHUL: That's correct, your Honor. The Court will notice there's a handwritten change on page 4 and page 5.

THE COURT: All right. Now, the original document that bears those changes you have signed, correct?

MR. HOCHUL: That's correct, your Honor.

THE COURT: That's the plea agreement document, and it's dated yesterday, which is the 7th of April.

MR. HOCHUL: That's correct, your Honor. That's the date I signed it.

THE COURT: Okay. And you've reviewed and discussed those changes with Mr. Harrington, Mr. Alwan?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And you know that if you chose to, you would not have to plead guilty here today. I mean, charges are brought against you. There's been a lot of -- at least comparatively speaking a lot of court activity relative to charges brought against you. But if you chose to, you could go and demand a trial on both of these particular charges, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And if there was to be a trial, it would likely be before a jury with 12 individuals required if there was a verdict to be rendered to be unanimous in that verdict. There may be alternate jurors that would be impaneled but would not participate in the jury deliberations.

There are circumstances under which a trial could take place before a judge, such as myself, without a jury present. But in either situation the government's burden would be the same. It would have to prove you guilty beyond a reasonable doubt on each essential element of each crime charged in the indictment, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: If it failed to prove even one of any of the essential elements of the crime charged, you could not be convicted, do you realize that?

THE DEFENDANT: Yes, sir.

THE COURT: If you were at trial, very important is the fact that you would be presumed innocent. That's the way our constitution and laws are. They guarantee that you are presumed innocent until that point in time when and if the government can prove you guilty beyond a reasonable doubt, is that clear to you?

THE DEFENDANT: Yes, sir.

THE COURT: And that presumption of innocence -- and if we went to trial in this case, meaning you and the government before a judge, myself perhaps, the -- because you are presumed innocent, you could just with your lawyer -- and you would have a lawyer throughout, Mr. Harrington primarily, and you could sit back and wait to see if the government has the kind of proof that amounts to proof beyond a reasonable doubt, is that clear to you?

THE DEFENDANT: Yes, sir.

THE COURT: If you chose to though with your lawyer, rather than just sit back, you could question the government's witnesses with your lawyer, challenge the evidence, put on a defense if that was in your best interest. You could even give testimony if you wanted to, but nobody could force you to do that because you have the constitutional right to remain silent.

If you went to trial, and the jury returned a verdict and you were found guilty, you would have the right, with your lawyer, to appeal that guilty verdict to a higher court, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, if we go forward today, what you're doing -- what you're doing is giving up your trial right, your right to appeal a guilty verdict in favor of entering a plea of guilty, and in all likelihood appearing here the next time in court for sentencing before me. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, what will happen on that occasion is I will have that presentence report that we talked about, and it will be made final and you will be told by me what my decisions are with respect to any open issues in that report, then you and your attorney will get the opportunity to make a statement after I hear you out and perhaps the government, and then and only then will I go forward with sentencing, is that clear to you?

THE DEFENDANT: Yes, sir.

THE COURT: Knowing all of that, is it your intention to proceed forward?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. You have the two documents in front of you at this time, correct?

MR. HARRINGTON: Judge, I'm sorry, I didn't bring a copy of the indictment with me.

THE COURT: Mr. Hochul, do you have an extra copy or not?

MR. HOCHUL: I do not, your Honor, I apologize.

THE COURT: Probation office to the rescue once again. Thank you very much, Mr. Quarantillo.

Just take a look and make sure that that is in point of fact the indictment. The number should be 02-Criminal-214, having two counts and returned October 21st, 2002?

MR. HARRINGTON: Yes, Judge.

THE COURT: Mr. Harrington, that is it?

MR. HARRINGTON: Yes, Judge.

THE COURT: Okay. And, Mr. Alwan, that's the document that you're familiar with?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And the plea agreement, as you know, is focused and linked to Count II of the indictment, is that your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, we're going to go through Count II at this time because I want to make certain that you are in full understanding of Count II. And in Count II -- are you looking at it now?

THE DEFENDANT: Yes, sir.

THE COURT: You've gone over this and reviewed it and discussed it in detail with Mr. Harrington?

THE DEFENDANT: Yes, sir.

THE COURT: The count relates to a period of time from in or about the spring of 2001 through on or about August 2nd of 2001 in the Western District of New York, which includes Buffalo and Lackawanna, and elsewhere -- and the way this charge reads is that certain defendants, namely Yahya Goba, Shafal Mosed, Yasein Taher, Faysal Galab, Mukhtar al-Bakri, and you, Sahim Alwan, did knowingly and unlawfully provide and attempt to provide material support and resources as that term is defined in Title 18, United States Code, Section 2339A(b) to a foreign terrorist organization, namely Al Qaida, in violation of Title 18, United States Code, Section 2339B and (2). Did you follow along with me and do you understand the charge?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand that this law is a relatively new and recent law, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Lets go from there to the plea agreement document. And, you know, if you have any doubts about the answer you're in the process giving to me, break, take your time, talk with your lawyer, clear to you?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Lets talk about the plea agreement now, and with the advice of your attorney I take it that you have signed the document in your own hand. And I have one that consists of 20 pages, and your signature -- at least appears what appears to be your signature on a line on page 20. Did you sign this with the advice of your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: And you were in full understanding and comfortable with this document when you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Mr. Harrington, you signed this document?

MR. HARRINGTON: Yes.

THE COURT: And your client signed it with your legal advice, is that correct?

MR. HARRINGTON: Yes, sir.

THE COURT: Mr. Hochul, your signature appears on the prior page, page 19, is that correct?

MR. HOCHUL: That's correct, your Honor.

THE COURT: Okay. As I mentioned earlier, you signed it on the 7th. Mr. Harrington and Mr. Alwan appear to have signed it today, the 8th, is that correct?

MR. HOCHUL: That's correct. I did sign it yesterday, your Honor.

THE COURT: Mr. Harrington, you and Mr. Alwan signed it today?

MR. HARRINGTON: Yes.

THE COURT: Okay. All right. Let's take a look now at the plea agreement document. And this document does consist of and include a cooperation section, and it contains a detailed factual basis which I will go through with you, Mr. Alwan, because my job is to determine whether that factual basis is sufficient in your case to meet the requirements of a conviction under Title 18, Section 2339A(b), do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right. Now lets talk about Section 1, page 1, the bottom paragraph which sets forth the penalty in this case for providing material support or resources to a designated foreign terrorist organization. Count II, which is the lesser of two charges in the indictment, carries with it a maximum possible sentence of a term of imprisonment of ten years, a fine of $200,000 or both, so I can give you both, you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And a mandatory 100-dollar special assessment, which is the cost of doing business essentially in federal court. Whenever any individual pleads guilty or is found guilty of a felony crime in federal court, the sentence will include a special assessment of $100, is that clear to you?

THE DEFENDANT: Yes, sir.

THE COURT: That will be made part of the sentence in this case. Now, also as part of your exposure for sentencing purposes is that in addition to doing jail time, you may be sentenced to a period of supervised release of between two and up to three years. Do you see that as part of paragraph 1?

THE DEFENDANT: Yes, sir.

THE COURT: Do you know what supervised release is?

THE DEFENDANT: Yes.

THE COURT: You discussed that with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: So, in other words, you know that if you were to receive jail time in this case -- and I haven't made up my mind on sentence, you know that, right?

THE DEFENDANT: Yes, sir.

THE COURT: That I can require after any jail time is completed that you obey certain conditions for a specific period of time. If you were to violate any of those conditions, and the government proved the violation -- and not prove it by a beyond a reasonable doubt standard, it would be less than that -- that violation could be punishable as if it were another crime. So in other words, you could be receiving an additional two-year sentence on top of the ten-year maximum, so that your maximum exposure bottom line here were you to receive the full sentence on the violation of the statute and the full sentence on the violation of a term or condition of your supervised release, you could do 12 years for the crime that you are pleading guilty here today, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Any questions about

your maximum sentence?

THE DEFENDANT: No, sir.

THE COURT: All right. Lets go to Section 2, and that references sentencing guidelines. And the sentencing guidelines are in point of fact that which controls your sentence for all practical purposes in this case, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And you've discussed the sentencing guidelines with Mr. Harrington?

THE DEFENDANT: Yes, sir.

THE COURT: And you know that the way they work, bottom line, is this. The crime that you are accused of committing fundamentally gets a starting point number, and that's called a base offense level number. And that number can be adjusted upward or downward depending on the evidence, the facts and the circumstances. And if you look into this plea agreement which you have, there are a number of adjustments that are discussed in the plea agreement, correct?

THE DEFENDANT: Yes, sir.

THE COURT: And why that's important is because the way the guidelines work, they work through a series of mathematical calculations for the most part. And when the adjustments are made either upward or downward or both, a resulting number takes place, and that's the sentencing number. That's called also the total offense level number. And that number, generally speaking, the higher it is, the more likely a higher sentence. The lower that number is, generally speaking, the more likely a lower sentence. And that number corresponds to a chart at the back of the sentencing guidelines book. Did you go over that with Mr. Harrington?

THE DEFENDANT: Yes, sir.

THE COURT: And when you plug in that number, and your criminal history score based on your prior convictions and the type of crime that you have been convicted of plugs into a box, and that box basically relates the number of months or years to be considered by the sentencing judge as far as sentencing is concerned. Is that your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: Now, as far as the guidelines are concerned, they're basically a guide to me, they don't bind me to do anything really. I'm bound by the maximum sentence imposed by the statute or the law, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And the adjustments that you see discussed in this plea agreement are similarly not binding on me. They are the best judgment of the lawyers in this case. And in all likelihood, the calculations will probably wind up that way, but what happens is the Probation Department in its report does a series of calculations also. They may sometimes turn out to be different. My job then would be to determine what the proper and precise calculations are and/or should be. If my numbers are different from yours and/or the probation office, and you don't like my numbers, that doesn't matter. You still are stuck with your plea of guilty, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. So in other words, you cannot withdraw your plea of guilty because my numbers don't match the numbers in this plea agreement, and you might be sentenced other than described in this plea agreement, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And you know that I have no commitments to you, correct?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. So, to a certain extent that's a frightening unknown prospect to you, is that a fair statement?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now look at page 2, the bottom of that particular page, and there's a reference to the elements of the crime in paragraph 4. And then if you look at the top of page 3 there are set forth sentences following numbers one, two, and three. And those in point of fact are what the attorneys agree are the essential elements of the crime in this case. Has that been explained to you?

THE DEFENDANT: Yes, sir.

THE COURT: And you know that the government must prove each beyond a reasonable doubt, and if it fails on any one, you cannot be convicted, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Knowing that, you still wish to go forward?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, we talked about the information having to be sufficient in the factual basis statement for me to accept your plea of guilty, you recall that, right?

THE DEFENDANT: Yes, sir.

THE COURT: Now, if you look at under number three of the essential elements, it is reflected here and you represent that you understand that the term that we've been talking about, foreign terrorist organization, includes Al Qaida, and that by attending the al Farouq training camp and transporting two videotapes from Kandahar to Karachi, that you did provide material support or resources to a foreign terrorist organization, is that your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Lets go right -- that's the segue, that's the transition now into the proof that is being discussed in the factual basis at the same time, and I want to go through that in some detail with you at this time, because what is about to come is what you are saying are the facts which form the basis for the entry of a plea of guilty. In other words, you are agreeing that these facts, were they to be true and the proof against you at a trial would be sufficient to sustain and establish a conviction beyond a reasonable doubt, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Take a look at subparagraph A of paragraph 5, and it reads essentially -- and I'll jump around a little bit, but basically in approximately April of 2001, that you, Sahim Alwan, together with certain co-defendants, Yahya Goba, Shafal Mosed, Faysal Galab, Mukhtar al-Bakri, and Yasein Taher, and others -- and we have, I don't know, maybe six or seven others that we're going to be talking about in this proffered factual statement -- agreed to attend a military-type training camp located in the country of Afghanistan. And that you knew prior to departing the United States, Mr. Alwan, that you were going to train for jihad, and jihad is described here as a struggle against those who are not of the Islamic faith, is that your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, going on in that same subparagraph it makes reference to two men whose identities are claimed to be known to the parties, meaning you and the government, and throughout the rest of this plea agreement will be designated as Persons 1 and 2. And they were responsible, according to this, for recruiting the defendants that we just talked about, for their trip to the training camp in Afghanistan.

Now, the recruiting of the defendants, so that I'm clear, does that include you?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, the reference in that subparagraph is a departure to Afghanistan to train for jihad. There's no reference there to the planned trip involving a camp associated with Al Qaida or that the trip at that point was illegal.

Is the government's proof limited as it is stated in this subparagraph at this point, Mr. Hochul?

MR. HOCHUL: As to this defendant, your Honor, yes, that's what the parties agree it could prove with respect to this defendant's knowledge.

THE COURT: Okay. Now, if we go on to -- is that your understanding?

THE DEFENDANT: Yes.

THE COURT: -- Mr. Alwan? Okay. Lets go to second subparagraph. And it references there a trip to Afghanistan, does it not?

THE DEFENDANT: Yes, sir.

THE COURT: And it talks about a period of time before that, before that trip, and it says that you received money from two men designated as Persons 3 and 4, not 1 and 2, but 3 and 4, and that you were aware of -- or at least the two men were aware of your upcoming trip to the military training camp in Afghanistan, do you see that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And they gave you, according to this, money for the purpose of defraying part of your costs associated with your joining jihad training, that's the effort against those who are not of the Islamic faith, is that an accurate statement?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Then it goes on to say that on May 14th of 2001 that you, together with two of the defendants in this case that we've talked about already, Yahya Goba and Mukhtar al-Bakri, and another man, now this is man number 5, right?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. That you went and

started your trip from this area to the al Farouq training camp. And it goes on to say that the three of you, the three defendants, you, Yahya Goba, and Mukhtar al-Bakri, and Person number 5 traveled from here, Buffalo, to Toronto, and boarded a flight to Karachi, Pakistan, and that you and this fifth person arrived in Karachi, Pakistan, the next day, on or about May 15th, 2001, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, I'm not sure I -- I mean, I have a recollection of some of the information from the other plea agreements relative to this trip that was referenced. There's no reference here to traveling to London or the United Arab Emirates.

What's the story on that, Mr. Hochul?

MR. HOCHUL: Your Honor, there was some transit and stop over points at intermediate cities, but for purposes of this agreement, the most relevant part is they boarded a flight in Toronto, and then deplaned with the intention of commencing a trip to Afghanistan once in Karachi, Pakistan. We simply have not included in this particular factual rendition the stopovers in either London or the United Arab Emirates.

THE COURT: So it's not a part of the agreement, but were there to be a trial, that might be a part of the proof, is that a fair statement?

MR. HOCHUL: Yes, your Honor. Had there been a trial, we believe we would have been able to introduce evidence consisting of the travel itinerary of Mr. Alwan, along with Mr.al-Bakri, Mr. Goba, and Person 5, which would have demonstrated the transition points along the way from Toronto to Karachi.

THE COURT: Okay. I want to proceed now to what's the second full paragraph, Mr. Alwan, on page 4. Do you see that beginning with "after spending several days in Karachi"?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. It now makes reference to you again, and Person number 1, now that's one of the recruiters, and Person number 5, one of the financiers --

MR. HOCHUL: No.

THE COURT: That's the -- number 5 who just came after the financing arrangements were complete.

MR. HOCHUL: Who traveled with Mr. Alwan

from Toronto.

THE COURT: Okay. And there's some further traveling then to Quetta, Pakistan, where all of you, according to this, stayed at a guesthouse believed to be associated with Osama bin Laden and the Al Qaida terrorist organization.

I want to focus on the "believed to be" for a moment, but I'm going to go to the next part of this discussion. And it says following the next day, that you, Mr. Alwan, Person number 1, the recruiter, and Person number 5, traveled to Kandahar, Afghanistan, where you apparently all stayed at another guesthouse, this time associated with the Al Qaida terrorist organization.

Is there any significance to the believing of the association with respect to Al Qaida and the terrorist organization and guesthouse number one and the actual associated with Al Qaida as to guesthouse number two, Mr. Hochul?

MR. HOCHUL: Your Honor, the only significance would be the fact that at the Kandahar guesthouse Mr. bin Laden himself was present. So the parties felt at this point that the conclusion would be inescapable insofar as Mr. bin Laden was present at the Kandahar guesthouse that, in fact, that guesthouse is associated with him and his organization.

As far as Quetta is concerned, the parties are confident that it similarly was associated with him in that this was a stage and a step on the way to the ultimate al Farouq training camp. However, insofar as Mr. bin Laden himself was never in the Quetta, Pakistan, guesthouse, the parties agree at this point that for purposes of the factual rendition, that they agree it was likely associated with him, but not conclusively so.

THE COURT: Okay. But it was then at the Kandahar guesthouse, and this is where Osama bin Lade apparently was --

MR. HOCHUL: Present.

THE COURT: -- right?

MR. HOCHUL: That's correct, your Honor.

THE COURT: That was where it is claimed that you, Mr. Alwan, learned that the training camp that you were about to attend was associated with Al Qaida, is that your agreement?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And it was at the Kandahar guesthouse that according to the statement of proof that you viewed videotapes and heard lectures which were anti-American in content, and which also showed and tried to justify suicide operations.

While at that Kandahar guesthouse, and on approximately the fourth of five days, that's when apparently Osama bin Laden appeared when you met him, and it was at that time, according to this statement, that bin Laden said to those at the guesthouse that there were people willing to bare their soles in their hands for jihad. Is that your agreement with respect to what Osama bin Laden said at the time?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Let me ask you this, talking about that fourth day at the guesthouse. Is it your statement and agreement that when you met Osama bin Laden, the then head of the Al Qaida terrorist organization, did you know the relationship at that time of Osama bin Laden with Al Qaida?

THE DEFENDANT: Do you mean like --

(Defendant consulted with his attorney off the record.)

THE DEFENDANT: I know he was the head of the organization, but the word -- the name Al Qaida itself is what I didn't know at that time. I know he was --

THE COURT: All right. Go ahead.

THE DEFENDANT: I mean, we knew he was the one in charge of that -- the organization that, you know, was involved in this. But I mean, the name itself Al Qaida was the one that wasn't clear at that time.

THE COURT: So you knew that he was the head of a terrorist organization.

THE DEFENDANT: At that point.

THE COURT: At that point.

THE DEFENDANT: Yes.

THE COURT: Fourth day, guesthouse.

THE DEFENDANT: When he came to the guesthouse.

THE COURT: Okay. Okay. Now, next and last paragraph on page 4. It says that five days after your arrival in Kandahar, you and Person number 5 and others traveled to the training camp, which, according to this, you later learned was called al Farouq, and was associated with Osama bin Laden and the Al Qaida terrorist organization, is that a fair statement?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. The others that are referred to, does that include Number 1, because Number 1 was with you up to this point in time according to this factual statement.

MR. HOCHUL: Yes, your Honor, that does include Person 1. Although Person 1 goes to a slightly different part of the same camp.

MR. HARRINGTON: Judge, we better correct that.

THE COURT: Okay. Let's hear from you, Mr. Alwan.

THE DEFENDANT: Person 1 --

THE COURT: That's the recruiter.

THE DEFENDANT: Right. He was at a different guesthouse at Kandahar. There's two guesthouse basically. One was for the newcomers. One was for -- he most have been an oldcomer. So he traveled into the camp before -- before myself and Person number 5 did.

THE COURT: Okay. And there's a reference to others. Are those others that shall go unnamed from the guesthouse --

THE DEFENDANT: Right.

THE COURT: -- you were in, the second guesthouse?

THE DEFENDANT: Right.

THE COURT: Mr. Hochul?

MR. HOCHUL: That's correct.

THE COURT: Okay. Then it says that over a period of time consisting of the next ten days, that you and others, while at the al Farouq training camp, worked under the direction and control of members of the Al Qaida organization and received and took orders from instructors at the camp. Did that happen?

THE DEFENDANT: Yes.

THE COURT: All right. Let me ask you this. This camp we're now referring to as al Farouq, I believe that there was a reference to Tazizi (phonetic) camp. You want to tell me if that's one in the same camp, or are those different camps?

THE DEFENDANT: That's the same one. That's what -- that's why it says over here later on I learned it was al Farouq. What -- what it was called while I was at the guesthouse was Tazizi.

MR. HOCHUL: That's correct, your Honor.

THE DEFENDANT: And the reason, you know, just the reason why they have a different name to it is Tazizi basically means basic, that's why they called it basic, so it was like a basic training. That's the reason why they called it.

THE COURT: And there's the difference between basic training camps and advanced training camps?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. All right. And then as far as your, if you will, basic camp training at al Farouq is concerned, among other things you're admitting to receiving training and instruction in the assembly and use of a Kalashnikov rifle, and that you fired that weapon several times during the course of your training. Is that what you're admitting to?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Hochul, is there any aspect relating to the "among other things" that includes training involving the handgun, the 9-millimeter, the rifle, the M16 automatic, the rocket propelled grenades, the launcher, et cetera?

MR. HOCHUL: No, your Honor. The "among other things" would have just referred to other directions that Mr. Alwan would have gotten during the course of his stay there. It does not include the other weapons as far as the parties are concerned. The government believes that Mr. Alwan just received training in that one particular firearm or rifle.

THE COURT: Okay. There's no mention here of his receiving or performing any guard duty. Is that also not a part of this scheme?

MR. HOCHUL: That's correct, your Honor.

THE COURT: Mr. Harrington, that's right?

MR. HARRINGTON: Yes, Judge.

THE COURT: Okay. All right. Now, we just concluded this period of the next ten days or so at this training camp.

And then the next paragraph says approximately eight days after you arrived at the al Farouq camp -- that's part of your ten-day period -- once again Osama bin Laden appeared and spoke to the persons at this camp. And by the time of that visit by Osama bin Laden, all of the defendants, Yahya Goba, Shafal Mosed, Yasein Taher, Faysal Galab, Mukhtar al-Bakri, and you were at the al Farouq camp, and that bin Laden's speech there was about the alliance of Al Qaida and the Egyptian Islamic jihad, and what he talked about was the making of anti-American and anti-Israeli statements, and he said to those in attendance --

this is Osama saying this -- that there were people willing to bare their soles in their hands for jihad, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Is that, in essence, the same thing that he said when you were at the guesthouse when you met with Osama bin Laden?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, there came a time after that ten-day period or so when you say that you left the al Farouq training camp, and you say in this agreement that you had not completed all of the training that was available. Is that, in fact, the case?

THE DEFENDANT: Yes, sir.

THE COURT: Okay.

MR. HARRINGTON: Judge, just to be clear, it's not that he's saying it. We're saying that it's true.

THE DEFENDANT: Right.

THE COURT: Okay. All right, fair enough.

MR. HOCHUL: That would be the government's evidence as well, your Honor, as Mr. Harrington said. He did, in fact, leave.

THE COURT: Okay. All right. And it's

also true that you departed Kandahar, and on the way out of Afghanistan that you were taken for a visit with Osama bin Laden at a residence in Kandahar, is that the truth?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And according to this, it was at that meeting and at that location when Osama bin Laden asked you certain questions relating to what Americans thought about martyrdom missions as well as how the brothers were doing at the al Farouq camp. Was that the conversation that you had?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And it goes on to say here that you were asked by another person at a Kandahar guesthouse -- is that a second Kandahar guesthouse now?

MR. HOCHUL: Yes, your Honor.

THE COURT: Okay. And that other person now is Person number 6, is that right, Mr. Hochul?

MR. HOCHUL: It is, your Honor.

THE COURT: Are you following this, Mr. Alwan?

THE DEFENDANT: Yes.

THE COURT: Okay. And you were asked to

transport to Karachi Pakistan certain items, and they're specified here as two videotapes, which you were told were the bombing of the USS Cole, and which you assumed were the same as those that were shown to you at the first guesthouse in Kandahar, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And that you did take them to Karachi and you gave those to a known associate of Person number 1, the recruiter, that would be Person number 7?

MR. HOCHUL: Yes, that would be the seventh person who's been mentioned so far in this rendition, your Honor, that's correct.

THE COURT: That person then, Mr. Alwan, you agree is now Person number 7?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Then it says on June 20th of 2001 you left the country of Pakistan and returned to JFK airport in New York on the same day. And then it says you are aware that a second group of persons from Lackawanna, New York, was considering traveling to the al Farouq training camp in Afghanistan for jihad training.

Now that seems to be inconsistent here with earlier information, Mr. Hochul.

MR. HOCHUL: Well, your Honor, if I may, we believe the government's evidence would have shown Mr. Alwan returned through Toronto, which was his point of embarkation I guess or departure. And if the Court would permit the parties, I believe we could make that correction in the written document.

THE COURT: Mr. Harrington?

MR. HARRINGTON: That's correct, Judge.

THE COURT: All right. So the document now will become consistent with respect to all of the defendants being at the camp at the time that Mr. Alwan was there as well as Osama bin Laden?

MR. HOCHUL: That's correct, your Honor.

THE COURT: Okay. All right. I will permit the amendment to the factual basis statement in that regard.

MR. HOCHUL: Very well. Thank you.

THE COURT: Mr. Alwan, do you have anything that you want to comment about that? That's accurate?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. When did you learn -- and the reason I'm asking this is because it does say here that you were aware that this training camp in Afghanistan was al Farouq, but on the earlier part of this factual basis statement you had not yet learned that the name was al Farouq. When did that knowledge come to your attention?

THE DEFENDANT: One second.

(Defendant consulted with his counsel off the record.)

THE DEFENDANT: I want to say, first of all, I don't dispute that this place Tazizi is al Farouq. But the name al Farouq itself, I want to make clear it doesn't mean that -- it wasn't -- I learned of the name of al Farouq itself when this whole case come up here in the United States when I was questioned, you know, when I gave my statement to Agent Needham, of the name itself al Farouq.

THE COURT: So when you say here that there was traveling to the al Farouq training camp, that doesn't mean you knew at that time that that camp was referred to by the name al Farouq?

THE DEFENDANT: That's correct. I know it was a training camp, but not al Farouq. And then it was always called Tazizi, that's what it was called.

THE COURT: Okay. Now, as I compute everything out -- well, let me do this first. The final two paragraphs on page 5 reference an agreement, one, that there's an agreement of the parties that Al Qaida is a designated foreign terrorist organization within the meaning of federal law. That's your agreement, correct?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. That's true, is it not?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And from the government's standpoint, at least what is represented here, Mr. Hochul, this is the total agreement as to the factual basis, but were you to proceed to trial, this would not be all of the government's proof with respect to the proving of any 2339B(a) violation.

MR. HOCHUL: That's correct, your Honor.

THE COURT: Okay. There seems to be a 15-day period from the time that you apparently left the al Farouq camp and flew back to the United States according to the way this is structured out.

Is there any agreement with respect to where defendant Alwan was during that period of time and what he did, Mr. Hochul?

MR. HOCHUL: No, your Honor. We're aware he was in the Kandahar guesthouse for a number of days, and we would have had evidence of that. And then also in a hotel in Karachi, the Farin Hotel, for a period of perhaps a day or two. But, that is the sum total of our factual basis at this time.

THE COURT: Okay. Well, let me ask you this, were this case to go to trial, what would the government's proof be at such time?

MR. HOCHUL: Your Honor, had this case proceeded to trial, the government's evidence would have shown beyond a reasonable doubt through, not only the testimony of witnesses but also the admission of what we believe would be evidence, that, in fact, prior to the defendant's trips, there was a series of meetings with the recruiters and also the defendants who are named in the indictment, including Mr. Alwan, in which the subject came up about the need to prepare for jihad and the need to go to a training camp in the country of Afghanistan for this purpose.

We would have been able to prove that, in fact, the defendant did leave from Toronto to Pakistan by introducing the travel itinerary and the tickets from Air Canada. We also would have been able to introduce evidence consisting of Mr. Alwan's passport which would have indicated an entry stamp into the country of Pakistan on May 14th, 2002, as well as an exit stamp on June 20th, 2002, from that same country, Pakistan.

We further would have been able to introduce evidence consisting of hotel records from the Farin Hotel demonstrating that Mr. Alwan stayed at the Farin Hotel for a number of days starting on May 14th, and that he returned to the Farin Hotel to stay on June 18th and 19th, 2002.

We further would have been able to introduce evidence consisting of persons who were actually at the al Farouq training camp while Mr. Alwan was at the al Farouq training camp. Such testimony coming from co-defendants in this case, including Faysal Galab, Shafal Mosed, and Yahya Goba, who would have testified as to what the training consisted of, the fact that the persons in attendance were under the direction and control of the persons who were running the camp, also the fact that Osama bin Laden came and spoke as represented in this plea agreement.

We further would have introduced evidence consisting of a statement that Mr. Alwan gave to Special Agent Ed Needham on September 12th, 2002, where Mr. Alwan admitted, among other things, traveling from Buffalo to Toronto to Pakistan, and then into the country of Afghanistan for training at the basic camp. Furthermore, in the statement Mr. Alwan would have admitted that -- we would have been able to introduce evidence consisting of Mr. Alwan's admission that, in fact, he did have training in the use, disassembly, and maintenance of a Kalashnikov rifle.

Furthermore, we would have introduced evidence consisting of the fact that Mr. Alwan admitted that the recruiter was in a different part of the camp, and that he was receiving advanced training in the use of anti-aircraft weapons.

Furthermore, we would have introduced evidence in the same statement Mr. Alwan made to Mr. Needham that the people who were running the camp were, in Mr. Alwan's words to Agent Needham, crazy -- or had crazy, radical mentality.

We further would have introduced evidence and asked the Court to take judicial notice of the fact that starting in 1998, there has been a prohibition on any transactions with terrorists who threaten and disrupt the Middle East peace process. That particular directive on August 20th, 1998, came by way of Executive Order 13099, and it was issued by

William Jefferson Clinton, the president at the time. And, furthermore, on October 8th, 1999, the United States Department of State specifically designated Al Qaida as a designated foreign terrorist organization.

We believe that after the testimony of the government's witnesses and the introduction of evidence, that a jury, in fact, would have been able to convict Mr. Alwan in this case of material support of the foreign terrorist organization Al Qaida.

THE COURT: Let me ask you this, Mr. Hochul, before you sit down now that you've sat down.

MR. HOCHUL: I'm sorry, your Honor.

THE COURT: That's okay. Faysal Galab made a couple of statements at least in his proof offer, one, that on a couple of occasions, defendant Alwan told him to lie relative to traveling to Afghanistan, and also with respect to Osama bin Laden and a statement that he apparently made, Osama, that is that with respect to a question that was posited to Mr. Alwan, whether anyone in America is willing to die for the cause. How does those instances as referred to by

Mr. Faysal Galab relate to the government's proof if you were to go to trial?

MR. HOCHUL: Well, your Honor, as the Court indicated, we would have had additional testimony, and certainly what I've just provided now to the Court as well as the factual basis is just what we feel is necessary to prove the charge. But, in fact, the government would have been able to introduce testimony of Mr. Faysal Galab relative to conversations he had with Mr.Alwan, in that Mr. Alwan, according to Mr. Galab, told Mr. Galab that the FBI had visited him, and that Mr. Alwan had said to Mr. Galab that he told them he was in the country of Pakistan for religious training, and did not admit that he was, in fact, going to the country of Afghanistan and did any training.

We would have introduced that evidence certainly, and from that particular evidence we would have been able to argue to the jury we feel that that's evidence of an obstruction of justice or a misleading of the FBI, and we would have asked for an instruction from the Court that it would have demonstrated -- or would have allowed the jury to infer consciousness of guilt on the part of the defendant as to the criminal charge under indictment. So that would have been another inference we would have asked the jury to make had they heard and had the benefit of the testimony of Mr. Galab.

THE COURT: What about the posited question with respect to whether there are any Americans willing to die for the cause?

MR. HOCHUL: Mr. Galab would have indicated that that's what Mr. Alwan said to him when he, Mr. Alwan, told Mr. Galab about the meeting Mr.Alwan had had with Mr. bin Laden.

MR. HARRINGTON: Judge --

THE COURT: All right. Mr. Harrington, is there anything you would like to comment about?

MR. HARRINGTON: Just so the record is clear, those factual statements are not in this plea agreement, and those are not admitted by the defendant. And if we had a trial I'm thoroughly confident that the representation that Mr. Alwan brought out today would be what a jury would find rather than what Mr. Galab said.

And you also have to remember here that we have individuals in these six defendants who have different levels of understanding of Arabic, and we have language problems, and understanding problems, and that's all I'm going to say about it.

THE COURT: Okay. All right. Mr. Alwan, is there anything you would like to say with respect to the discussions we've had about the factual basis proof statement, anything that the prosecutor has said or anything that your lawyer has said?

THE DEFENDANT: No, sir.

THE COURT: Okay. Let's move forward then to the rest of the plea agreement. And as you recall, we were talking about the sentencing guidelines. And I just want to call your attention, if you will, to page 6, paragraph 7, which follows the starting number of 22 for this particular crime that is at issue here. And there's a reference to the possibility of a 12-level upward adjustment pursuant to the guidelines, because the federal crime that is being brought against you involved or intended to promote a federal crime of terrorism, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And that's a finding that I have to make in the process of what the numbers should calculate out to be, is that clear?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And there is a reference here to the fact that a three-level lowering of the number for acceptance of responsibility should be afforded to you, but again, that's my determination to make, you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, there is an agreement here at paragraph 10, page 7 that you and the government agree not to move for, request, recommend, or suggest any upward or downward adjustments or departures other than the ones that are specifically outlined in this plea agreement. Is that your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. We talked earlier about your criminal history number and the final calculated number for guideline purposes. And take a look at paragraph 12 on the bottom of page 7. If the calculations work out this way under the sentencing law, in all likelihood, you would be sentenced, according to this, at a level 31 and a criminal history category of six, which under the sentencing law would expose you to between 188 and

235 months in jail, well over the statutory maximum of 120 months, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And the guidelines would include with it a fine of $15,000 to $150,000 and supervised release between two to three years.

Now you know you cannot be sentenced to more than -- at least on Count II, to more than ten years, is that your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, we already discussed that if I don't buy into these calculations, that doesn't mean that you can withdraw your plea of guilty, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, there's a reference at page 8 to the statute of limitations in which it is represented that you agree not to assert the statute of limitations under certain circumstances, and that that waiver shall be effective for a period of six months following the date upon which any withdrawal of the guilty plea or vacating of the conviction becomes final. Do you understand that that's the agreement you entered into?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Section four -- and this is before we get to the cooperation paragraph, which is about to come. There's a rights and reservations section, and I want to go over that in summary with you. And in essence what it says is that the government, assuming this plea is accepted and sentencing takes place, will move to dismiss that first count of the indictment, which is the more severe count in terms of sentencing. You understand that, right?

THE DEFENDANT: Yes, sir.

THE COURT: And secondly, that the government has reserved the right to provide information to the probation office relative to you and your criminal history, that it can respond at sentencing to statements that you or your attorney make that may be inconsistent with the information and evidence currently available to the government, and that the government may possibly even modify its position with respect to this agreement and the sentencing recommendation in the event that after this agreement, in other words, subsequent to this agreement, the government receives information that it didn't know about at the time it entered into this agreement with you and made its recommendation in this case, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And you know that you may be required to provide financial information upon request to the probation office in this case, is that clear?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, we talked about your appeal rights, and I told you -- and this is at page 10, Section 5, that you have the right with an attorney to take an appeal to a higher court, but you also can, under our constitution and laws, restrict or limit that right to appeal, and that agreement has been entered into here. Both you and the government have given up parts of your absolute right to appeal. So that if the sentence is higher than the guideline range discussed, the government cannot appeal. If it's lower than the guideline range discussed, you cannot appeal, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Let's talk about the cooperation that you have agreed to provide.

And there are multiple paragraphs in Section 6 on multiple pages of this agreement, which, in essence, set out the rules and the parameters for an agreement to cooperate in exchange for a possible benefit to you with respect to sentencing. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And you discussed this in detail with Mr. Harrington?

THE DEFENDANT: Yes, sir.

THE COURT: And in essence tell me if this is your understanding, that if and only if you provide to the government what it believes to be substantial cooperation will it then be obligated to make a request of me to lower your calculated sentencing number by a certain number of levels.

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand that if what you provide to the government in its view does not amount to substantial cooperation, for all practical purposes it's not obligated to do anything further on your behalf, the government, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And that when the government

represents that in its view the cooperation was not substantial, that's essentially not reviewable other than if there are indicia of bad faith or if perhaps the government does not include the full picture of everything that you have done by way of cooperation in its representations to me, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, your cooperation, according to this agreement, is not limited to the prosecutor's office, Mr. Battle's office, or Mr. Hochul, but it extends to any local, state, federal, or military authority designated by the government who have agreed to abide by the terms of the cooperation section of this agreement, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And that can include testimony in federal, state, and local courts, including military commissions, in the jurisdictions that have agreed to abide by the terms and conditions of this agreement. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: But the guarantee or assurance you have is that in no event will you be removed from United States' custody.

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, the government has further cut you a deal, and it says that you will not, in exchange for your compliance with this plea agreement and cooperation, be prosecuted by the United States Government including military authorities -- and you represent that you have the authority from them to make that representation, Mr. Hochul?

MR. HOCHUL: I do, your Honor.

THE COURT: -- for any other criminal offenses committed anywhere in any way involving or relating to providing material support or resources to a foreign terrorist organization and/or engaging in transactions with a specially designated terrorist and/or terrorist organization and/or the defendant's trip, meaning your trip, to Afghanistan committed up to the date of this agreement, and about which you have provided complete and truthful information. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: What does that mean with respect to the defendant's trip to Afghanistan? I thought that's what we're talking about here.

MR. HOCHUL: It is, your Honor. I believe this is just further specification that what we're talking about is the defendant's trip to Afghanistan. But it was already clear without that information between the two commas that he will not be prosecuted for any transaction with a foreign terrorist organization.

THE COURT: This is your effort to make more clear what was already clear?

MR. HOCHUL: I can only represent to the Court I agreed to that clause. I didn't suggest that clause. I believe that came at the request of Mr. Alwan and his attorney.

MR. HARRINGTON: Judge, if you want me to clarify it --

THE COURT: Please.

MR. HARRINGTON: The agreement just related to material assistance to a terrorist organization. And the additional language is to cover other potential offenses that might not fit under that particular section, that's all.

THE COURT: Deriving from the trip and activity in Afghanistan?

MR. HARRINGTON: Yes.

THE COURT: Fair enough. Okay. But this

does not -- this agreement doesn't preclude any prosecution for any attempt murder, act of murder, act of physical violence against a person of another, you understand that, Mr. Alwan?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. All right. And you understand too, I take it -- if you don't, let me know -- that any -- no testimony or statements or objects that you may have provided to the government in compliance with this agreement will be used against you in any criminal case or military commission, except were you furthermore to be prosecuted for perjury or making false statements, and we talked about that briefly at the beginning, right?

THE DEFENDANT: Yes, sir.

THE COURT: That's your understanding?

THE DEFENDANT: Yes.

THE COURT: Okay. Now, let's go to what you get for cooperating substantially, understanding that I'm not bound or locked into this. But if -- is that correct, you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And I will

consider everything presented to me by you, by Mr. Harrington with respect to the appropriateness of a sentence, and how to act with respect to any request of the government to downwardly depart, and here's what the government says. It says that if you substantially cooperate, it will, meaning the government, ask me to sentence you and downwardly depart by seven levels. And it posits two scenarios where by doing that, if I were to grant that request -- and the under the law I'm required to give that request what is called due deference. In other words, I have to consider it seriously from the government. And that if I do it on the basis of the calculation that's set forth here, your sentencing would wind up at a level 24 and a sentencing range of 100 to 125 months, essentially less than the statutory maximum of 120. There is a five-month excess there. But the recommendation then to me will be that I give you a 108-month sentence or nine years. Do you understand that's the agreement that you've entered into with the government?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And then the alternative that's talked about there is if the calculation winds up being from a different series of numbers or levels, nevertheless the government's recommendation will be the same, 108 months or nine years, is that your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And once again, my analysis of the guidelines and what controls for calculation purposes is what determines the numbers that apply for a consideration of sentence in your case, is that clear?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now your agreement, by the way, if you look at paragraph 24, that's at the top of page 14, it's not contingent upon whatever you give to the government resulting in the filing of any charges against or the additional return of an indictment or successful prosecution of any person or entity, is that your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: And if you look at paragraph 26, in the event that I'm requested by the government and declare that you have breached this agreement, you are exposed to the following. In other words, the government, one, will be relieved of its obligations under the terms and conditions of this agreement, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And that the government can rely on certain statements and information that you gave to establish the violation that results in the revocation of this agreement, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And if the agreement is declared breach, in other words, broken, that doesn't mean that you will have a right to withdraw your plea of guilty, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: The government can make a request to me to withdraw that downward departure request that we talked about, right?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And that there is also the fact that other than what you say in open court here, your statements can be used directly or indirectly in any and all criminal proceedings against you, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And you agree further not to

assert the statute of limitations as a defense to any criminal offense that will result involving or related to providing material support to a foreign terrorist organization which is not time barred at the date of this agreement, and for an effective period of an additional six months, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And if you have not fulfilled your full cooperation so that you get the maximum benefit of your cooperation agreement, request can be made to extend the sentencing date in this case, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Look at page 17, Section 7, and it's called enemy combatant status, which has serious aspects to that classification. And what paragraph 29 says is that the United States, meaning the prosecutor, agrees to forego any right that it would have to detain you as an enemy combatant based upon the conduct in the factual basis or any other conduct about which you have provided complete and truthful information, provided you comply with all of the terms and conditions of this agreement. That's the deal. Is that your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. All right. Section 8, and we talked about your providing financial information to the probation office when requested to do so. But this agreement also has an aspect to it where, were there to be any profits or proceeds that you might be entitled to receive in some fashion because of certain publications or information that results from the conduct involving this indictment, that you give your right to those dollars to the United States, and that you cannot benefit from those monies or profits, regardless of whether those monies are made payable directly to you or to others in benefit of not only you, but of them, or your family members, and that there can be no assignment that you enter into which can defeat the thrust and understanding of this particular assignment of profits, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Page 18, Section 9, designation. The government agrees -- do you normally recommend to the Bureau of Prisons where there should be a designation of a defendant?

MR. HOCHUL: No, your Honor, ordinarily in my practice we do not. We simply leave the complete decision to the Bureau of Prisons. I know periodically defendants request the Court to make certain recommendations, but in those instances it is left to the Bureau of Prisons.

In this case we represent on behalf of Mr. Alwan that we will affirmatively make recommendations that he be placed in the facility closest to his family here in Western New York. The parties agree in this provision, however, that while we'll make that recommendation, certainly the final decision will be up to the Bureau of Prisons.

THE COURT: Not only is it to the facility nearest this locality, but it's the least secure of the facilities to which he would qualify. And secondly, that hand-in-hand with that is that there be an affirmative representation from the government that Mr. Alwan not be designated to the administrative maximum facility at Florence, Colorado?

MR. HOCHUL: That's correct, your Honor. And that's one of the things that we committed to in this agreement.

THE COURT: Okay. That to me seems to be the full and total agreement entered into between the parties. Are there any other promises or representations that have been made to you, Mr. Alwan, that are not contained in this written agreement that you are relying upon in your decision to, one, enter into the written agreement, and, two, to enter a plea of guilty to Count II of the indictment?

THE DEFENDANT: No.

THE COURT: Do you understand that question?

THE DEFENDANT: Yes.

THE COURT: Okay. There is a reference here to -- on page 19 at the top. And it says this agreement supersedes any other prior agreements written or oral entered into between the government and the defendant.

Were there other agreements, Mr. Hochul?

MR. HOCHUL: Your Honor, there was a proffer agreement which did not involve the disposition of this case, but that's a sort of agreement I suppose between the parties. This particular document will now control the defendant and the government as we go forward from this date.

THE COURT: All right. That is your understanding also, Mr. Alwan?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. All right. In essence, with respect to this statutory violation of Count II, Mr. Hochul, are you saying that it is the government's position that the participation as described in and outlined in the Al Qaida al Farouq camp, as well as the transporting of the two videos constitute the essence of the government's case with respect to Mr. Alwan for purposes of a violation of 2339?

MR. HOCHUL: That's correct, your Honor.

THE COURT: And that is with respect to providing material support and resources to a terrorist organization, namely Al Qaida?

MR. HOCHUL: That's correct, or attempting to as well.

THE COURT: Yes, I stand corrected. Thank you. Okay. I'm prepared to accept and make a part of the record the plea agreement in this case, unless I otherwise hear objection.

Is there any objection from you, Mr. Alwan?

THE DEFENDANT: No, your Honor.

THE COURT: Mr. Harrington?

MR. HARRINGTON: No.

THE COURT: Mr. Hochul?

MR. HOCHUL: No, not from the government, your Honor. Thank you.

THE COURT: Okay. The agreement is now part of the record in this case. It's accepted. I'm going to ask you now, Mr. Alwan, how you plead to knowingly and unlawfully as charged in Count II of the indictment, provide and attempt to provide material support and resources to a foreign terrorist organization, namely al Qaida as defined and determined in federal law, do you plead guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: All right. Mr. Sahim Alwan, I find specifically that your plea of guilty is a knowing plea, in other words, you understand the terms, the conditions, and the possible consequences that you face in connection with this proceeding, correct?

THE DEFENDANT: Yes, sir.

THE COURT: That you have done what you have just done now voluntarily, that nobody has forced or threatened you to enter into the plea agreement, or to enter a plea of guilty in this case, and your plea of guilty is therefore voluntary, is that your statement to me?

THE DEFENDANT: Yes, sir.

THE COURT: And I so find. And I find specifically that were this case to go to trial, whether it was before me without a jury, or before a jury of 12 individuals who are required to return a unanimous verdict in the return of a verdict, that the proof here in my view would be sufficient for a trier of fact as a basis for a determination that each essential element of the crime charged has been satisfied by the government's proof beyond a reasonable doubt, therefore resulting in a conviction that is sustainable by that proof standard beyond a reasonable doubt. I, therefore, accept your guilty plea, and I now adjudge you guilty of having committed this crime as charged in Count II of the indictment.

Do you have any questions about what I have said, what I have just done with you?

THE DEFENDANT: No, your Honor.

THE COURT: Okay. Sentencing will be?

THE CLERK: Thursday, July 31st at 10:00 o'clock.

THE COURT: Thursday, July 31st at 10:00 o'clock.

Anything further that needs to be addressed at this time, Mr. Hochul?

MR. HOCHUL: Your Honor, there is a pending motion before Judge -- Magistrate Judge Schroeder, relating to Mr. Alwan's continued status as far as detention is concerned. Will the Court make certain findings at this time?

THE COURT: I will.

Mr. Harrington, anything you want to add in that regard?

MR. HARRINGTON: No, Judge. We consent now to his detention.

THE COURT: Okay. I will accept that --

MR. HOCHUL: Very well.

THE COURT: -- as full compliance with the requirements, including the incorporation of my determination that what we are dealing with is a crime of violence, that the provision relating to the period of time from sentencing -- from plea to sentencing given that this is a crime of violence, given that there is a consent, given that there is clear and convincing proof with respect to the likelihood of flight and the dangerousness, all of those elements being satisfied, that detention will continue in this case. That is my finding.

MR. HOCHUL: Very well. Thank you, your

Honor.

* * * * * *

CERTIFICATION

I certify that the foregoing is a Correct transcription of the proceedings Recorded by me in this matter.

s/Michelle L. McLaughlin
Michelle L. McLaughlin, RPR
Official Reporter
U.S.D.C., W.D.N.Y.